Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

NO. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

vs.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF THE STATE OF NEW YORK IN REPLY TO THE BRIEFS OF THE STATES OF TEXAS, *ET AL.*, AND ALABAMA, *ET AL.*, AND DELAWARE, AND BRIEF OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

August 31, 1992

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The State of New York, defendant, hereby respectfully moves for leave to file the annexed Reply Brief to the Briefs of the States of Texas, *et al.*, and Alabama, *et al.*, and the Brief of the State of Delaware in Response to the Briefs of the States of Michigan, *et al.*, and New York. The Court's scheduling Order, dated February 24, 1992, does not expressly provide for the filing of this Reply Brief.

The briefs filed pursuant to the Court's scheduling Order consist of the Exceptions and Briefs filed by the States of New York, Delaware, and Michigan, *et al.*, in opposition to the Special Master's Report, and the Reply Briefs filed by the States of Texas,

et al., and Alabama, *et al.*, in opposition to the Exceptions and in support of the Report. In addition, during the reply stage, New York, Delaware, and Michigan, *et al.*, filed briefs in response to each other's opening briefs. However, New York and Delaware, the States taking principal exception to the Special Master's Report, have not had the opportunity to respond to the States that fully support the Report, Texas, *et al.*, and Alabama, *et al.*

Permitting New York to file the annexed Reply Brief, therefore, follows the standard practice of according the right of reply to the petitioner or appellant in matters on appeal to the Court. As in any other matter, this Reply Brief will assist the Court in resolving the issues. In addition, New York's claim under the *Texas v. New Jersey* primary rule requires further explication because the discussions of New York's position in the Briefs of Texas, *et al.*, and Alabama, *et al.*, are fundamentally inaccurate. Delaware's arguments concerning the *Texas* primary rule, reserved principally for its Reply Brief, also necessitate a reply because they misconstrue New York's position as well. Finally, New York has filed this motion within the time period provided by the Court for the filing of reply briefs.

WHEREFORE, New York respectfully moves this Court that leave be granted to file the annexed Reply Brief.

Dated: New York, New York
August 31, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant

Robert A. Forte

ROBERT A. FORTE
Assistant Attorney General
of Counsel
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

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BRIEF OF THE STATE OF NEW YORK IN REPLY TO THE BRIEFS OF THE STATES OF TEXAS, *ET AL.*, AND ALABAMA, *ET AL.*, AND DELAWARE

SUMMARY OF ARGUMENT

The States of Texas, *et al.* ("Texas") and Alabama, *et al.* ("Alabama") argue that the Court should revert to the "core principles" of *Texas v. New Jersey* - fairness and ease of administration - and conclude that all of the property involved in this case should escheat to the jurisdictions of the securities issuers. Texas Brief at 14-21; Alabama Brief at 11-18. This argument, also adopted by the Special Master, completely ignores the fact that in *Texas v. New Jersey*, the Court already formulated precise rules for fairly and efficiently resolving disputes among the States

over the escheat of abandoned intangibles. The rules are grounded in the debtor-creditor relationships established by state law, and were created for the express purpose of settling such disputes "*once and for all*." 379 U.S. at 677 (emphasis added). Accordingly, the crux of the Texas and Alabama position, that the Court should revisit *Texas v. New Jersey* and rewrite the rules of escheat priority it created there, is completely antithetical to its decision.

The changes in the *Texas* rules advocated by Texas and Alabama, moreover, fundamentally alter the basic principles of escheat law that have prevailed among the States and in the financial community ever since *Texas v. New Jersey* was decided over 27 years ago. Under the *Texas* rules of priority, the right to escheat abandoned intangibles belongs first to the jurisdiction of the *creditor* as shown by the *debtor's* books and records, and secondarily to the *debtor's* jurisdiction. Texas's and Alabama's focus on the relationship between the securities issuer and ultimate beneficial owner hypothecates a debtor-creditor relationship that simply does not exist in commercial law and is inconsistent with the States' own escheat laws and practices.

The Texas and Alabama proposal that the Court sever the *Texas* rules of priority from state commercial and escheat laws and announce substantive debtor-creditor rules can serve no conceivable federal purpose and will undermine the Court's concerns for fairness, certainty, and ease of administration. Additionally, the completely unorthodox definitions which Texas and Alabama ascribe to the terms "debtor" and "creditor" will necessarily raise endless disputes among the States over the meaning of these terms in other contexts, which this Court will be asked to resolve. Finally, the massive disruptions that must accompany Texas's and Alabama's proposals - the wholesale restructuring of the States' escheat practices and the complete redesign of the technological systems and compliance procedures of the institutions (brokerage firms, banks and depositories) that ensure the payment of securities distributions to their proper recipients - will dislodge the settled expectations that have evolved in the 27 years since *Texas v. New Jersey* was decided.

With regard to New York's right under the *Texas* primary rule to escheat the property held by New York debtor brokers, the evidentiary record supports all of the elements of New York's claim. The creditors can be identified from the debtor brokers' books and records and they are virtually all brokers and banks with New York trading addresses. New York seeks additional discovery, beyond that authorized by the Special Master, for the sole purpose of tracing a statistically valid sample of transactions which give rise to abandoned property to demonstrate that in most instances, the *actual* creditors of the property are brokers and banks with New York trading addresses on the debtor brokers' books and records. Under the *Texas* primary rule, New York is the only jurisdiction entitled to escheat the property owed to the creditors with New York addresses.

ARGUMENT

POINT I

THE COURT SHOULD ADHERE TO THE *TEXAS V. NEW JERSEY* RULES OF ESCHEAT PRIORITY IN THIS CASE

A. Texas And Alabama Propose Radical Departures From The *Texas* Rules

The conclusion that Texas and Alabama (and the Report of the Special Master) seek fundamental changes in the *Texas* rules is evident from their focus on the relationship between the issuer of a security and the ultimate beneficial owner, rather than the debtor - creditor relationships established by state law. The issuer - beneficial owner focus cannot be reconciled with the *Texas* rules, which look first to the jurisdiction of the *creditor* as shown by the *debtor's* books and records, and then to the *debtor's* jurisdiction. 379 U.S. at 682.

The securities issuer can not be the debtor of the property in this case for the axiomatic reason that the issuer's debt is discharged upon payment of a distribution to the record owner. This fundamental commercial law principle is contained in

caselaw and codified at U.C.C. § 8-207(1), which all States and the District of Columbia have adopted. *See* Exceptions of the State of New York to the Report of the Special Master at 60-62. The Special Master also recognized that the debtor-creditor relationships defined by U.C.C. § 8-207(1) are essential to the issuer's ability to pay distributions. *See* Report at 25.

The Texas and Alabama position, that the term "debtor" in the *Texas* rules should be applied to the securities issuer, is simply wrong. *See* Texas Brief at 16-32; Alabama Brief at 11-23. The *Texas* rules use the term "debtor" both to provide a focal point (the debtor's books and records) for identifying the creditor's jurisdiction under the primary rule, and for identifying the jurisdiction entitled to escheat under the backup rule. *Texas v. New Jersey*, 379 U.S. at 681, 682. Only state law, which defines the debtor-creditor relationships surrounding unclaimed distributions with certainty and finality, implements these goals. Texas's and Alabama's contention, that U.C.C. § 8-207(1) does not create uniformity because it only provides the issuer with an affirmative defense, is incorrect. *See* Texas Brief at 24-25; Alabama Brief at 18-23, 28-30. It is the universality of the commercial law rule, not exceptions in particular factual contexts, that has defined the States' escheat practices. Prior to Texas's intervention in this litigation, all States recognized that the term "debtor" in the *Texas* rules meant the record owner after the receipt of payment from the issuer, not the issuer.

Finally, the very notion that the Court used the term "debtor" to encompass the issuer *after its debt was discharged* destroys any semblance of certainty and predictability under the *Texas* rules. In *Texas v. New Jersey*, the Court referred to the issuer, Sun Oil, as the debtor and ignored its paying and transfer agents because their possession of Sun's property did not discharge its debts. The Court, thereby, dispelled any doubt that only the debt obligor is the debtor under the *Texas* rules. *Compare with* Alabama Brief at 19-22. Record owners, by contrast, are agents of the beneficial owners, not of the issuer. The issuer's payment of the distribution to the record owner, therefore, is entirely different and has the legal consequence of discharging the issuer's

debt. Ultimately, Texas and Alabama (and the Special Master) never justify using the term "debtor" to mean an entity *whose debt was discharged*. Their distortion of the common sense meaning of "debtor" in the context of the *Texas* rules will promote endless disputes over the identity of the debtors of other abandoned intangibles and leave the application of the *Texas* rules in turmoil.

It is equally clear that the Texas and Alabama focus on the beneficial owner as the creditor under the *Texas* primary rule violates both the rule's wording and intent. The primary rule gives the right to escheat in the first instance to the creditor's jurisdiction in recognition of the debt as the creditor's asset. 379 U.S. at 681. The rule also spells out the means of identifying the creditor's jurisdiction - the creditor's last known address *as shown by the debtor's books and records*. *Id*. All States through their escheat laws, as well as financial institutions holding unclaimed distributions as record owners, have uniformly identified the creditors of this property under the *Texas* primary rule as the apparent owners on the debtor's books and records, not the beneficial owners. *See* Exceptions of the State of New York to the Report of the Special Master at 59-60; Brief of *Amici* at 11.

The Texas and Alabama position, adopted by the Special Master, that the beneficial owners are the creditors of the property, undoes both the fairness and certainty that the Court built into the *Texas* primary rule. Since this position counsels against using the addresses of the financial institutions that are owed the property, it repudiates the last known address provision of the rule. More importantly, the fact that the debtor brokers' books and records never identify beneficial owners as such relegates all of the property to escheat under the *Texas* backup rule. This destroys the priority intended for the creditors' jurisdictions. Finally, the uniform brokerage practice of paying beneficial owners all of the distributions to which they are entitled, whether or not the brokers themselves received payment, completely eliminates any rationale for treating the beneficial owners as the creditors. *See* Exceptions of the State of New York to the Report of the Special Master at 30-31.

Texas's argument, that beneficial owners are not irrelevant to issuers because they are the actual owners of the underlying securities, misses the mark. *See* Texas Brief at 26-30. Of course issuers are concerned about the beneficial owners, and beneficial owners do have some rights with respect to issuers, such as a right to sue. However, beneficial owners have *no right* to payment of a distribution from the issuer. Texas does not dispute the essential fact that the issuer's responsibility for paying a distribution is fully satisfied upon payment to the record owner. The beneficial owner's right to payment lies only against its own broker. If anything, Texas's argument merely illustrates New York's position that beneficial ownership is an inappropriate focus under the *Texas* primary rule for the additional reason that the attributes of beneficial ownership are highly variable and are reflected in complex federal securities regulations that attempt to define it. *See* Exceptions of the State of New York to the Report of the Special Master at 5.

B. Texas's And Alabama's Rationale For Departing From The *Texas* Rules Is Inconsistent With Precedent And Ease Of Administration

Texas and Alabama are still rearguing *Pennsylvania v. New York*. They assert that their position is fairer because it will result in a wide dispersal of unclaimed distributions among the States.[1]

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[1] This dispersal is actually accomplished by merging the Texas and Alabama definition of the issuer as the debtor with the Special Master's proposal that the Court change the locator under the *Texas* backup rule from state of incorporation to chief executive office. Contrary to the statements of Delaware, New York does not support the proposal that the location of the debtor's jurisdiction under the *Texas* backup rule be changed from domicile to chief executive office. *See* Brief For Delaware in Response to Exceptions of Michigan, *et al.*, and New York (July 1992), at 23-24. New York's position throughout this litigation has been that the *Texas* rules have proved workable in practice and have provided needed certainty and should, therefore, be adhered to strictly rather than be reconsidered on a case-by-case basis. Delaware appears to have confused New York's stated inability to argue against the Special Master's conclusion that chief executive office is a workable locator, with support for a change in the backup rule itself. *See* Exceptions of the State of New York to the Report of the Special Master at 73.

Texas Brief at 26; Alabama Brief at 23-28. In *Pennsylvania v. New York*, however, the States raised identical fairness arguments:

> *Texas v. New Jersey* was an exercise by the Supreme Court of its constitutional power to determine controversies between States. In the exercise of that power, the Court was guided by considerations of fairness and equity among the States, and the rules there declared were so declared to accomplish the desired fairness and equity.
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> * * *
>
> To apply here the no address rule of *Texas v. New Jersey* without considering the purpose of the Court in that case to accomplish fairness and equity among the States, would be to defeat such purpose here.

Exceptions of Plaintiff, Commonwealth of Pennsylvania, to Report of the Special Master in *Pennsylvania v. New York*, filed Jan. 26, 1971, at 1-2.

In rejecting this argument, the Court expressed its preference for rules of certainty and finality over the States' parochial interests in dividing up the property:

> In other words, to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided - that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

407 U.S. at 215 (quoting *Texas v. New Jersey*, 379 U.S. at 679).

Finally, Texas's and Alabama's contention that their issuer-debtor position is easy to administer is untenable. *See* Texas Brief at 30-32; Alabama Brief at 29-34. As demonstrated by *amici*, representing the entire spectrum of financial institutions in

the United States, the proposed new rules will cause the distribution of securities-related payments to become more complex and costly and ultimately less efficient. Brief of *Amici* at 13-20. In addition, *amici* demonstrate how the proposed new rules will make it more difficult for claimants to retrieve their property. *Compare* Brief of *Amici* at 22-23, *with* Texas Brief at 32 and Alabama Brief at 29 n.32.

POINT II

UNDER THE *TEXAS* PRIMARY RULE NEW YORK IS THE ONLY JURISDICTION ENTITLED TO ESCHEAT THE PROPERTY OWED TO CREDITORS WITH NEW YORK ADDRESSES ON THE DEBTORS' BOOKS AND RECORDS

A. The Debtor Brokers' Books And Records Identify The Apparent Owners Of The Underlying Securities

Texas and Alabama do not (and can not) dispute that the apparent owner of the security is identified on the debtor broker's books and records. The apparent owner is the creditor broker or bank that received delivery of the security from the debtor broker, and is the only entity entitled to make a claim for a distribution against the debtor broker. *See also* Brief of *Amici* at 11. The debtor broker necessarily maintains records of its sales and deliveries of securities, and it uses these records to verify the claims for distributions brought by the apparent owners. *Accord*, Report of the Special Master, Appendix B, Fact (62), at B-18. Texas and Alabama argue, however, that absent a claim for the distribution, the debtor broker is unable to determine the particular transaction that yielded it. Texas Brief at 36; Alabama Brief at 35, *see also* Delaware Brief at 33. The States' references to the evidentiary record do not support this argument.

The brokers testified only that it was impossible for them to identify the beneficial owner, or the holder of the security

on the record date, from their records. Shearer Dep. at 192-93; Principe Dep. at 102-05. The brokers' responses also incorporated the questioners' assumption that the creditor was the beneficial owner. *See, e.g.*, Cirrito Dep. at 93-94. Such testimony does not support the proposition that the brokers are unable to identify the apparent owners of unclaimed distributions. Moreover, since the brokers do not research *any* overage attributable to nominee float unless they receive a claim, their characterization of the property they remit to New York as owner unknown simply reflects the fact that no research is done, not that the apparent owner could not be identified with sufficient effort. *See* Shearer Dep. at 213-15; Principe Dep. at 222; Cirrito Dep. at 128. Even in the case of stock loans and pledges, the borrowing broker waits for a claim regardless of the fact that its records expressly identify the firm entitled to the distribution. Cirrito Dep. at 218.

The sole argument against New York's position distills into the hypothetical assumption that the debtor broker's records may reveal more than one delivery of identical share amounts of the same security, or that a particular overpayment may be the net result of a number of different transactions. Texas Brief 40-41; Delaware Brief at 24-27. Although these States simply assume that such situations exist and would be sufficiently prevalent to affect the identification of the apparent owner, New York has shown that this is not the case through its evidenced ability to identify the apparent owners of unclaimed distributions from the debtor brokers' books and records. *See* Affidavit of Robert Griffin, Director of Audits (May 5, 1988). And, indeed, although New York has never claimed that every transaction can be traced, the identification of the apparent owner is easier than Texas and Delaware suggest because the only relevant transactions are those that occurred close to a record date. New York's demonstrated ability to identify the apparent owners from the debtor brokers' books and records is simply uncontroverted on the record.[2]

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[2] Texas and Alabama also contend that New York's position is contradicted by its statements in a prior State proceeding involving the brokerage firm

(Footnote continued)

Texas and Alabama also assert that identifying the first recipient of a physical certificate from a brokerage firm "fails to establish the necessary ownership interest" since "New York concedes that the first recipients of certificates from DTC and custodian banks are not the 'apparent owners.' " Alabama Brief at 39-40; *see also* Texas Brief at 36; Delaware Brief at 26, 33. As New York has pointed out several times, however, this argument is incorrect because of the fundamental difference between DTC's Cede float and the brokers' nominee float. *See* Exceptions of the State of New York to the Report of the Special Master at 25, 30; Reply of the State of New York to the Exceptions and Brief of the State of Delaware and States of Michigan, *et al.*, at 7-8. When a broker delivers out a certificate to settle a trade in the underlying security, the first recipient is the new owner of the security and, therefore, the apparent owner on the debtor broker's books and records.[3] By contrast, DTC delivers out certificates to its own participants to make physical deliveries to parties unknown to DTC. Custodian banks also deliver out certificates to their customers' brokers to settle trades in the underlying securities. In either instance, the first recipient is not the apparent owner and is not recognized by these entities as the creditor of an unclaimed distribution. *See, e.g.*, DTC Statement at 17.

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of Paine Webber (citing the "Paine Webber" stipulation), and by sections of New York's Abandoned Property Law. Texas Brief at 37; Alabama Brief at 35-36. These arguments, although presented to the Special Master, were never credited by him, indicating their lack of probative value regarding New York's primary rule claim. In any event, neither the stipulation, nor the statute which predates *Texas v. New Jersey*, disproves New York's ability to identify the apparent owners of unclaimed distributions from the debtor brokers' books and records. *See also* New York's Brief in Opposition to the Motions of the Plaintiff-Intervenor States (Dec. 18, 1990), at 56-59.

[3] Brokerage firms also deliver out certificates to other brokers and to banks on stock loans and pledges. In these situations, however, the delivering broker's customer still owns the certificate and the broker's records reflect the fact that the recipient broker or bank is not the owner. Deposition Transcript of Robert Shearer, Merrill Lynch, Pierce, Fenner & Smith, Inc., 293-95 (July 19-20, 1990) ("Shearer Dep."); Deposition Transcript of Joseph Principe, John Hancock Clearing Corp. (Tucker Anthony, Inc.), 78, 100-01, 168 (July 25, 1990) ("Principe Dep."); Deposition Transcript of John Cirrito, Prudential-Bache Securities, Inc., 218 (July 26, 1990) ("Cirrito Dep.").

B. The Apparent Owners Are The Creditor Brokers And Banks That Received Deliveries Of Nominee Float From The Debtor Brokers

Texas and Alabama contend that New York's ability to identify the apparent owners of nominee float from the debtor brokers' books and records is not sufficient to justify its claim under the *Texas* primary rule because the nominee float delivered to the apparent owners is not the only source of unclaimed distributions. Texas Brief at 38-39; Alabama Brief at 41-43; *see also* Delaware Brief at 27, 29-31. These States assert that abandoned property is also caused by (1) errors (including missed transfers[4] and out-of-balance conditions with issuers' paying agents and DTC), in which case the creditor would be unknown; and (2) the brokers' practice of delivering physical certificates to customers registered in the brokers' street name, in which case the creditor would be known but would not necessarily be a New York-addressed entity or individual. *Id.* The States contend, therefore, that New York is not entitled to the property held by debtor brokers in New York. The fallacy of the argument is that the evidentiary record contradicts the premise that there are significant causes of unclaimed property other than nominee float.

(1) Errors. The various references to the evidentiary record cited by Texas, Alabama and Delaware for the proposition that errors are a recognized cause of unclaimed property merely establish that errors contribute to initial overages. *See, e.g.*, Shearer Dep. at 192-96, 420-21; Principe Dep. at 97-98; Cirrito Dep. at 224-25. *See also* DTC's discussion of the possible causes of initial overages (DeCesare Dep. at 87-91, 120-21, 133, 138, 195-97).[5] The salient

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[4] Missed transfers are not "errors." They are delays in the re-registration of physical certificates resulting in initial overages because a record date has been missed. These overages are not significant for escheat purposes because they are routinely tracked by the record owner and new owner. An example of a situation in which a missed transfer can lead to an initial overage, but not abandoned property, is discussed at II.B(2), *post*.

[5] Deposition Transcript of Raymond DeCesare, The Depository Trust Company ("DTC") (May 15-16, 1990).

difference between *initial* overages and unclaimed property is that the overage represents a raw surplus figure that arises after the broker has received a distribution and credited its customers' accounts, whereas unclaimed property is the remainder of that overage at the end of New York's three-year dormancy period. *See* N.Y. Aband. Prop. Law § 511. At the end of three years, when the brokers escheat the property to New York, it is their opinion that the principal cause of the escheated property is the floating certificate or nominee float. Cirrito Dep. at 128-29. This is in accord with DTC's equation of its abandoned property holdings with Cede float. DeCesare Dep. at 353; DTC Statement at 15-18.

Texas and Alabama argue, in essence, that because the brokers can not discount the possibility that errors remain undetected at the time they escheat their abandoned property holdings to New York, all of the property should be deemed owner-unknown. Texas Brief at 39; Alabama Brief at 42-43; *see also* Delaware Brief at 29. This example of the tail-wagging-the-dog illogic defeats the very purpose of the *Texas* primary rule by requiring that *all* of the brokers' property escheat under the backup rule based upon the speculation that it may be appropriate for a small percentage of it to escheat in that manner.

In addition, the States' argument ignores the fact that to the extent errors are involved in creating initial overages, their effect on abandoned property is insignificant. The evidentiary record establishes that all financial institutions engage in intensive efforts to correct errors and resolve out-of-balance conditions. *See, e.g.*, Shearer Dep. at 196-97 (describing the steps that are taken to make sure that the distributions received by Merrill Lynch and paid to its customers are "absolutely correct"); *see also* Brief of *Amici* at 20-21 (financial institutions have developed procedures and computer systems, comprising legal, accounting and technological components, designed to ensure that their customers are paid all of the distributions to which they are entitled). The brokers' customers also initiate inquiries if they fail to receive a distribution, resulting in corrective measures by their brokers. Shearer Dep. at 226-27. Finally, out-of-balance conditions are unlikely to go undetected because

they are also the subject of research by the paying agent and DTC. If the agent or DTC has overpaid a record owner, it will receive a claim from the record owner it has correspondingly underpaid. DeCesare Dep. at 120-22. The efficiency of the industry's error corrective procedures is amply demonstrated by the fact that DTC has never had an unresolved overage in a certificateless issue after three years. DTC Statement at 15. It is also substantiated by the fact that only 2.6% of the claims paid by New York between 1985 and 1989 were to individual claimants.

(2) Deliveries to customers of certificates registered in the broker's street name. Texas's and Delaware's reliance on these deliveries to refute New York's claim under the *Texas* primary rule is equally misconceived because such deliveries do not generate abandoned property. The deliveries are almost exclusively confined to institutional customers and, indeed, would be a "terrible practice" in any other context. Principe Dep. at 65-66; *see also* Shearer Dep. at 34; Cirrito Dep. at 128-29. The customer obtains the certificates for the purpose of re-registering them into its name or the street name of its custodian bank. *Id.*; *see also* Scott Dep. at 80. If the re-registration misses a record date and the distribution is paid to the broker, there is little if any possibility that it will be escheated. Custodian banks routinely make claims for distributions on missed transfers (*see* Scott Dep. at 138-39), and it is highly unlikely that an institutional customer or any other customer expecting a distribution would not.

C. Unclaimed Distributions Held By New York Debtor Brokers Can Be Traced to Apparent Owners With New York Trading Addresses In Virtually All Instances

The States' last challenge to New York's claim under the *Texas* primary rule centers around the use of trading addresses to identify the apparent owners of unclaimed distributions from the debtor brokers' books and records. They assert that this approach is a *post hoc* effort to establish an identity for creditors that are in fact unknown. Texas Brief at 42; Alabama Brief at 44-45; Delaware Brief at 36-37. They also assert that the use of trading

addresses would only create a presumption as to the creditors' identities, not establish their actual identities as required by the *Texas* primary rule. *Id.* These arguments are based on misunderstandings of New York's position.

The claim that New York's use of trading addresses is a *post hoc* defense rests upon the initial misconception that the creditors of this property are the beneficial owners, or record date holders who obtained the securities as the result of a more distant transaction unrelated to the debtors and creditors of the abandoned property. *See, e.g.*, Delaware Brief at 34-35. As New York has demonstrated, however, the creditors of unclaimed distributions are the apparent owners - the brokers and banks that first received deliveries of nominee float. Accordingly, the fact that the debtor brokers' books and records do not identify the beneficial owners or record date holders has no bearing on the validity of the trading address as the means of identifying the creditors of the property.

The States' contention that the trading address itself is an artifice is equally meritless. Texas Brief at 42; Alabama Brief at 44-45; Delaware Brief at 27. A New York trading address establishes the actual presence of the creditor broker or bank in New York. The trading address designates the place from which the creditor broker or bank conducts its securities trades and where it maintains its record-keeping facilities. It is, therefore, the only relevant address for locating the creditors under the *Texas* primary rule. Delaware's contention that a New York trading address is really a New York City address, and that this somehow renders the address unsuitable for locating the creditors under the *Texas* primary rule, is nonsense. *See* Delaware Brief at 27. The fact that creditor brokers and banks have New York City addresses demonstrates why New York is entitled to escheat their abandoned property holdings. Delaware's claim is also not advanced by the fact that a broker such as Tucker Anthony is headquartered in another State but conducts securities trades in New York through a New York correspondent brokerage or clearing firm. *See* Documents Lodged With The Court (May 9, 1988), Tab C, at 196-97 (defining "correspondent" or "clearing" firm). In this situation, the New York correspondent firm is the creditor

because it is the apparent owner on the debtor broker's books and records, no different in position with respect to the debtor broker than a broker acting directly on behalf of a customer. Accordingly, a correspondent firm with a New York trading address establishes the creditor's presence in New York.

The States' last assertion is that New York's use of trading addresses to locate the creditors of unclaimed distributions can only demonstrate that brokers and banks in New York are owed the property "in general," thereby failing to satisfy the *Texas* primary rule's requirement of particularity. Texas Brief at 42; Alabama Brief at 44-45; Delaware Brief at 33-35. This argument is a fundamental distortion of New York's position. New York's claim under the *Texas* primary rule is based on the fact that the *actual* creditors of *particular* unclaimed distributions can be identified from the debtor brokers' books and records. New York seeks further discovery for the sole purpose of tracing a sufficient number of transactions to demonstrate that in most instances, the *actual* creditors of the property on the debtor brokers' books and records are creditor brokers and banks with New York trading addresses.[6]

The States' contention, that New York's claim is generalized rather than specific because New York ascribes New York trading addresses to "virtually all" rather than "all" creditor brokers and

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[6] Although it is argued that New York should have utilized the prior depositions of the brokerage firms to establish the brokers' ability to trace transactions and identify the apparent owners of unclaimed distributions, this argument is untenable. First, this line of inquiry was expressly excluded from the scope of discovery. The parties were not permitted, "at this juncture in the proceedings at any rate," to conduct discovery "detailing the address record-keeping practices in the industry." Litigation Management Order No. 1 (Oct. 18, 1989), ¶ 1. In addition, since the brokers testified that they do not (rather than can not) trace overages due to nominee float unless a claim is made, the actual tracing process could not have been explored through their testimony. Finally, even if New York had successfully undertaken this line of questioning, it would not have affected the outcome of the Special Master's Report since the Master was only concerned with identifying the beneficial owners: "It should be made clear at this juncture, however, that in applying the primary rule, the last-known-address of the beneficial owners, not other intermediaries, will control." Report at 67.

banks, is incorrect. *See, e.g.*, Delaware Brief at 33-35. This suggests only that a small percentage of the property may be owed to a few out-of-state brokers with out-of-state trading addresses who trade with New York debtor brokers. The property that is owed elsewhere is payable elsewhere, and this does not refute New York's claim to the property owed to New York creditors. The fact that virtually all of the creditor brokers and banks entitled to the property in question have New York trading addresses simply demonstrates that most of the property is escheatable to New York.

Finally, Delaware's contention that the trading activities of regional and small brokerage firms trading outside of New York are relevant to the property claimed by New York is totally misplaced. *See* Delaware Brief at 37.[7] These firms, trading in other States, report their unclaimed distributions to those States based upon the same understanding of the debtors and creditors of the property as that held by New York. New York's claim extends only to the property owed to New York creditors. Since New York is the only State entitled to escheat this property under the *Texas* primary rule, it should be permitted to conduct further discovery to establish the actual identities of the New York-addressed creditors from the debtor brokers' books and records.

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[7] Delaware's reference to the Brief of *Amici* to support its contention that regional and small brokers are owed property escheated by New York is not supportable. *Amici*'s discussion of such firms was solely in the context of refuting the Special Master's conclusion that it would not be administratively difficult for these firms to report their own abandoned property holdings to the jurisdictions of the issuers under Texas's and Alabama's theory. *See* Brief of *Amici* at 14.

CONCLUSION

THE INTERVENORS' COMPLAINTS SHOULD BE DISMISSED AND THE MATTER REMANDED FOR FURTHER DISCOVERY

Dated: New York, New York
August 31, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
of Counsel